

22. What threshold test should be used to determine when the Parties will establish direct end office trunks?²⁴⁶

Findings of Fact

71. A Direct End Office Trunk ("DEOT") is an interconnection trunk group between a POI and an end office. It rides the facilities of each party on its side of the POI.²⁴⁷

72. A DEOT's capacity is 24 trunks, or DS1 level.²⁴⁸

Conclusions of Law and Discussion

Commission decisions have stated that where traffic is reciprocal, DEOTs may be established upon mutual agreement of the carriers.²⁴⁹ Charter's proposal would ensure that the threshold test for determining when Parties will establish DEOTs will be based on actual traffic volumes. This standard ensures that DEOTs are not established based on speculative levels of anticipated traffic volumes between the Parties' networks, or volumes of traffic that may only arise at some undefined point in the future. Specificity benefits both Parties, while still ensuring that necessary traffic and trunk engineering arrangements are established when appropriate.

²⁴⁶ CenturyTel's phrasing of this issue is: "Should the Parties utilize reasonable projections of traffic volumes in addition to actual traffic measurement in their determination of whether the threshold has been reached for purposes of establishing dedicated end office trunks versus after-the-fact traffic measurement solely for such determination?"

²⁴⁷ The Arbitrator takes administrative notice of this fact pursuant to § 536.070 RSMo.

²⁴⁸ Ex. 1, p. 65, l. 6-8.

²⁴⁹ *SBC Arbitration-Arbitrator's Final*, Section V, p. 11 (June 21, 2005) (noting further that "neither carrier may require separate trunk groups").

CenturyTel's language is problematic in that it would require that the Parties establish DEOTs based, at least in part, on "projected" traffic volumes. CenturyTel's language therefore could require DEOTs to be established when traffic does not actually meet the agreed-upon DS1 threshold. If the projection is incorrect and traffic volumes do not reach the threshold level, DEOTs would be unnecessary.

Furthermore, setting the threshold on projected demand, as CenturyTel proposes, could lead to disputes between the Parties as to which Party's projected traffic volumes are accurate and should be used to determine whether the threshold has been met.

Decision

The threshold test for determining when Parties will establish DEOTs must be based on actual traffic volumes to ensure that DEOTs are not established based on speculative volumes or volumes that may or may not exist in the future. CenturyTel's language is vague and subject to traffic projections that may not materialize. Charter's proposed language bases the threshold on actual traffic volumes, which would avoid potential disputes between the Parties by using data that is objective and verifiable. For these reasons, Charter's proposed language will be adopted.

The Arbitrator finds this issue in favor of Charter.

23(a). Where Charter is the N-1 carrier for calls to ported numbers of third party carriers, should Charter be responsible for data base queries and the proper routing of its calls to third party carriers? (b) For calls that Charter fails to fulfill its N-1 carrier obligations and are routed improperly to a CenturyTel end office, what

should charter be required to pay to CenturyTel for the completion of such calls to third parties?²⁵⁰

Findings of Fact

73. The area of disagreement relates to Section 4.6.5 where the call is delivered to a CenturyTel *end office or tandem* and the N-1 query has not been done by Charter.²⁵¹

74. CenturyTel explains the N-1 query function and the need for it to ensure proper routing of a call. Where Charter is the N-1 carrier, Charter agrees that it must do the N-1 query.²⁵²

75. With respect to the second aspect of Issue 23 – the routing of unqueried of calls – CenturyTel witness Watkins outlines the steps that CenturyTel would be required to undertake if an unqueried Charter call were to be delivered to a CenturyTel end office or tandem for termination.²⁵³

76. Calling these efforts “extraordinary measures”²⁵⁴, CenturyTel witness Watkins explains that, even though it is not required to, CenturyTel will attempt to complete the call for Charter so long as Charter pays for the routing functions.²⁵⁵

77. The access rate elements that should apply in this situation – “the NP query charge; (b) Tandem Switching; (c) Tandem Switching Facility, and (d) Transport Switched

²⁵⁰ Charter’s phrasing of this issue is: “Should Charter pay CenturyTel a tariffed access charge for transiting traffic where CenturyTel end office switches perform a transit functionality for unqueried calls that have been ported to another carrier?”

²⁵¹ Ex. 13, p. 79, l. 10-14.

²⁵² *Id.* at 80, l. 19 – 81, l. 5; Ex. 14, p. 58, l. 28-29.

²⁵³ *Id.* at 82, l. 16 – 83, l. 6.

²⁵⁴ *Id.* at 83, l. 1.

²⁵⁵ *Id.* at 83, l. 9-14; Ex. 14, p. 59, l. 20-21; p. 60, l. 1-3; p. 61, l. 7-10.

Termination" – should be paid and are the elements that CenturyTel has included within the Agreement.²⁵⁶

78. If Charter is not willing to pay these charges, Charter should undertake the routing and querying itself.²⁵⁷

79. Charter's position on the rate issue is inconsistent with its agreement to the rates that apply to properly delivered queried calls and provides no justification for this not-to-exceed rate of \$0.005.²⁵⁸

Conclusions of Law and Discussion

Initially, there is no issue with respect to Charter's responsibility to conduct the necessary query when it is the "N-1" carrier in a call; Charter acknowledges the same. As a result, the explicit confirmation of this Charter obligation sought by CenturyTel under Issue 23(a) is granted.

There are two aspects of Issue 23(b) that need to be addressed with respect to when Charter does not undertake its N-1 obligations. First, Charter does not object to the application of the intrastate access rate elements that CenturyTel has proposed, and it appears that the rates are not actually in dispute. Therefore, those rate elements and the rates that are included in the CenturyTel intrastate access tariff apply.

The Arbitrator agrees with CenturyTel that there is no basis to assume that a cap of \$0.005 should be imposed, particularly since the underlying rates proposed by CenturyTel have not been placed in issue by Charter. Also, this rate is for the transiting function alone.

²⁵⁶ *Id.* at 84, l. 5-10; p. 85, l. 17-22.

²⁵⁷ *Id.* at 84, l. 12-21.

²⁵⁸ Ex. 14, p. 60, l. 10-22.

The query required by CenturyTel to undertake is an additional charge that CenturyTel may assess against Charter.

Second, there appears to be some concern on Charter's behalf with respect to CenturyTel's willingness to engage in the necessary functions in an effort to attempt to route a Charter unqueried call. Because Charter must compensate CenturyTel for unqueried Charter calls, CenturyTel indicates that it will undertake reasonable efforts to properly route the call where such routing is technically feasible with the scope of existing network hierarchy and existing relationships with third party carriers. This standard is appropriate since the call is being improperly routed to the end office or tandem for termination and the ability to ensure call completion is not a reasonable requirement to impose on CenturyTel. Therefore, like with Charter, the Arbitrator makes an explicit confirmation of this CenturyTel obligation.

Accordingly, Charter's language is rejected and CenturyTel's language regarding Issue 23 is adopted. Because the Parties agree that the intrastate access rates proposed by CenturyTel are appropriate, there is no need to address Charter's claims regarding TELRIC pricing.

Decision

The Arbitrator finds this issue in favor of CenturyTel.

Article VI – Unbundled Network Elements

24. Should Charter have access to the customer side of the Network Interface Device (“NID”) without having to compensate CenturyTel for such access?²⁵⁹

For the reasons discussed under Issue 2, the Arbitrator finds this issue in Charter’s favor.

Article IX – Additional Services

27. When Charter submits an LSR requesting a number port, should Charter be contractually required to pay the service order charge(s) applicable to such LSR?²⁶⁰

Findings of Fact

80. CenturyTel requests that language be included within the Agreement that allows either Party to charge the other for the costs of processing local service requests, including service requests related to number porting.²⁶¹

²⁵⁹ CenturyTel’s phrasing of this issue is: “(a) Should Article IX, Section 3.4 clarify that the End user controls the Inside Wire except in those multi-tenant properties where CenturyTel owns and maintains such Inside Wire? (b) Is Charter required to submit an order to and pay CenturyTel for accessing CenturyTel’s NID when Charter connects its loop to the End User’s Inside Wiring through the customer access side of the CenturyTel NID?”

²⁶⁰ Charter’s phrasing of this issue is: “Should CenturyTel be allowed to assess a charge for administrative costs for porting telephone numbers from its network to Charter’s network?”

²⁶¹ Joint Statement, pp. 94-95.

81. CenturyTel incurs costs for the processing of local service requests.²⁶²

82. The service order rates represent the administrative costs of processing the local service request and the recovery of those costs.²⁶³

83. These costs are not part of the actual porting process.²⁶⁴

Conclusions of Law and Discussion

Although the Parties both recognize that costs are incurred by a Party when a local service request is processed, they disagree on who should be responsible for these costs. The testimony of Charter witness Giaminetti²⁶⁵ and Exhibit 26 reflect the fact that an affiliate of Charter and an affiliate of CenturyTel have agreed to assess such service charges related to porting in Wisconsin.

The Arbitrator concludes that CenturyTel's position is allowed under the FCC rules and orders, which do not prohibit such charges. Moreover, CenturyTel's position allows both Parties to recover their costs for processing local service requests regarding number portability.

²⁶² Ex. 15, p. 4, l. 13 – p. 7, l. 12.

²⁶³ Ex. 13, p. 89, l. 14-15.

²⁶⁴ *Id.* at 93, l. 15 – 94, l. 16; Ex. 15, p. 2, l. 4-19.

²⁶⁵ Tr. 239, l. 14-20.

The Arbitrator carefully reviewed and considered the significant FCC decisions cited by Charter and CenturyTel.²⁶⁶ A review of these decisions reveals that the *Third Report and Order* established a cost recovery mechanism for LNP costs. The costs considered under the *Third Report and Order* were primarily for database and systems upgrades to allow for LNP to be implemented. In the *Third Report and Order*, the FCC concluded

that carrier-specific costs directly related to providing number portability are limited to costs carriers incur specifically in the provision of number portability services, such as for the querying of calls and the porting of telephone numbers from one carrier to another. Costs that carriers incur as an incidental consequence of number portability, however, are not costs directly related to providing number portability.²⁶⁷

The costs underlying the CenturyTel local service request charge are separate and apart from the costs recovered under the FCC's LNP cost recovery mechanism. As CenturyTel noted, the service order type costs associated with porting a number between two competing local service providers were not contemplated by the *Third Report and Order* to be included in the FCC's LNP cost recovery mechanism. This was confirmed in the FCC's *LNP Clarification Order*.

The FCC stated, in the context of the BellSouth petition for declaratory ruling on LNP cost recovery, that local service request costs do not constitute costs directly related to

²⁶⁶ These orders primarily consisted of the following:

1. *In the Matter of Telephone Number Portability, Third Report and Order*, CC Docket No. 95-116, FCC 98-82, 13 FCC Rcd 11,701 (Rel. May 12, 1998) (*Third Report and Order*).
2. *In the Matter of Telephone Number Portability*, BellSouth Corporation Petition for Declaratory Ruling and/or Waiver, Order, CC Docket No. 95-116, FCC 04-91, 19 FCC Rcd 6800 (Rel. Apr 13, 2004) ("*LNP Clarification Order*") at Footnote 49.
3. *In the Matter of Telephone Number Portability, Memorandum Opinion and Order on Reconsideration and Order on Application for Review*, CC Docket No. 95-116, FCC 02-16, 17 FCC Rcd 2578 (Rel. Feb. 15, 2002) ("*2002 LNP Order*").
4. *Telephone Number Portability Cost Classification Proceeding*, Docket 95-116, RM 8535, DA-98-2534, 13 FCC Rcd 24495 (Rel. Dec. 14, 1998) ("*LNP Cost Classification Order*") at para. 14.

²⁶⁷ *Third Report and Order* at para. 72.

providing number portability and are therefore not recoverable through the federally tariffed end-user LNP charge. In fact, the FCC stated that "[w]ere BellSouth to seek recovery of such costs through its [federal end user] tariff, they would be rejected."²⁶⁸

The Arbitrator also notes that the foregoing conclusion is not without support from other state commissions. Although these other state commission decisions are not binding upon the Arbitrator or the Commission, the Michigan, Arkansas, Oregon, Colorado and Texas commissions have each reviewed contentions similar to those made by Charter, and each of these five (5) state commissions have concluded, as has the Arbitrator, that service order charges related to requests for porting are not precluded by the Act.²⁶⁹

The FCC has not mandated or prohibited the recovery of the costs for processing a local service request associated with local number porting. In fact, based on the *LNP Clarification Order*, the FCC ruled that the costs associated with a service order process are not recoverable under its end user surcharge recovery mechanism. Accordingly, the language offered by CenturyTel that allows both Parties to recover their costs associated with local service requests is reasonable and should be included in the Agreement.

As the record reflects and supports, this conclusion is consistent with traditional notions of cost causation and cost recovery, and provides for the recovery of costs not included within the Section 52.33 cost categories recoverable under a tariffed end-user

²⁶⁸ *LNP Clarification Order* at footnote 49.

²⁶⁹ *Michigan Commission Decision* at 23; *Arkansas Order* at 10; *Oregon Commission Decision* at 13; *Colorado Commission Decision* at 57; (Texas) *Sprint Communications Company L.P. Arbitration with Consolidated Communications of Fort Bend Company, Arbitration Award*, Texas Public Utility Commission, Docket No. 31577 (December 19, 2006).

surcharge. Thus, CenturyTel's proposed language in Article IX, § 1.2.3 is accepted and should be included in the Agreement.

Decision

The Arbitrator finds this issue in favor of CenturyTel.

Article X - OSS

28. Does CenturyTel have the right to monitor and audit Charter's access to its OSS systems?²⁷⁰

Findings of Fact

84. The license granted to Charter pursuant to the Agreement is a limited license, and monitoring of Charter's use of CenturyTel's OSS system is appropriate to ensure compliance with the terms of the license. Further, since the OSS system contains customer proprietary network information, CenturyTel should be allowed to monitor/audit Charter's use to confirm compliance with applicable laws.²⁷¹

85. There is no reason for CenturyTel to provide further details to Charter concerning when and how CenturyTel plans to conduct its monitoring of use of the OSS system for potential misuse or abuse by Charter,²⁷² as Article X, § 8.3.3 requires information obtained by CenturyTel be treated as "Confidential Information" pursuant to

²⁷⁰ Charter's phrasing of this issue is: "Should CenturyTel be entitled to monitor, and audit, Charter's use of OSS systems which Charter may use to make a service request, or other similar request, of CenturyTel?"

²⁷¹ Ex. 21, p. 54, l. 2-14.

²⁷² Ex. 22, p. 38, l. 10 – p. 39, l. 4.

Article III, § 14.0, and in light of CenturyTel's corporate policy regarding the use of a competitor's proprietary information.²⁷³

86. Charter's position that prior consent to CenturyTel's monitor/audit rights may be withheld in Charter's sole discretion means that Charter could simply withhold consent for any or no reason, and CenturyTel would have no recourse. Charter could insist that it be provided an amount of details on CenturyTel's monitoring as to defeat its purpose, as would advance notice to Charter.²⁷⁴

Conclusions of Law and Discussion

It is clear from the record and the undisputed terms of the Agreement that the OSS system is owned by CenturyTel and that pursuant to Article X of the Agreement, Charter is procuring a limited license to use such system. CenturyTel has a legitimate interest in reserving its rights to monitor or audit Charter's use of this system to confirm that such use is consistent with the terms and conditions of the Agreement as well as applicable law. On the other hand, Charter has a legitimate interest in being reasonably assured that the information gathered by CenturyTel in the course of monitoring or auditing Charter's use of the OSS system is not used to Charter's competitive detriment.

As Charter's witness has pointed out, Article X, § 12 of the Agreement contains agreed upon language that requires both Parties to comply with all applicable laws in connection with performance under the Agreement, including 47 U.S.C. § 222, which relates to the privacy of customer information.²⁷⁵ Further, Article X, § 8.3.3 provides that

²⁷³ *Id.* at 40, l. 2 – p. 41, l. 6.

²⁷⁴ *Id.* at 41, l. 7-15.

²⁷⁵ Ex. 10, p. 3, l. 16-27.

any information that CenturyTel obtains pursuant to Section 8.0 shall be treated as Confidential Information pursuant to Article III, § 14.0, which is again agreed upon language intended to protect such information from misuse. Finally, CenturyTel has *existing* corporate policy entitled "Acceptable Use of Information Provided by Competitors" that addresses, among other matters, limitations on access to and use of information relating to a competitive carrier.²⁷⁶

In the face of these multiple assurances by CenturyTel that monitoring/auditing of Charter's use of CenturyTel's OSS system will be for proper purposes, Charter has proposed language that its witness confirms would allow it to deny CenturyTel the right to monitor/audit in Charter's *sole discretion*. "Sole discretion" has been judicially interpreted to mean "unfettered authority."²⁷⁷ Charter's conditioning of its consent to CenturyTel's monitoring/auditing of use of its OSS system in this manner is unreasonable and unnecessary.

In contrast, CenturyTel's proposed language for Article X, §§ 8.3.1, 8.3.2 and 8.3.3 is reasonably calculated to serve CenturyTel's need to confirm Charter's proper use of the OSS system while, at the same time, providing protection to Charter's competitively sensitive information. As such, the Arbitrator finds that the language proposed by CenturyTel for resolution of this Issue 28 should be and hereby is approved.

Decision

The Arbitrator finds this issue in favor of CenturyTel.

²⁷⁶ Ex. 22, p. 40, l. 2 – p. 41, l. 16.

²⁷⁷ *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1154 (D.C. Cir. 1984); see also *Missouri Nat'l. Educ. Ass'n v. Missouri State Bd. of Educ.*, 34 S.W.3d 266, 280 (Mo.App. 2000).

29. Should the Agreement preserve CenturyTel's rights to recover from Charter certain unspecified costs of providing access to "new upgraded, or enhanced" OSS?

Findings of Fact

87. CenturyTel has not provided any evidence on the nature of the costs it seeks to "recover" through its proposed contract language.²⁷⁸

Conclusions of Law and Discussion

CenturyTel should not have the right to assess any charges upon Charter for the recovery of any OSS costs or "expenses" that CenturyTel may incur, except as specifically authorized under the terms of the Agreement. Indeed, as Mr. Webber testified, the Parties should only be permitted to recover their respective costs or "expenses" in accordance with the corresponding rates expressly identified in the Pricing Article of the Agreement.²⁷⁹ In contrast, CenturyTel's proposed language would allow CenturyTel to assess charges upon Charter for alleged costs that CenturyTel has not identified, or quantified.²⁸⁰

There is no evidence in the record that indicates when, or whether, CenturyTel proposes to upgrade or enhance its OSS during the term of the Agreement.²⁸¹ Significantly, CenturyTel has yet to make clear what its unspecified costs may entail, how

²⁷⁸ Ex. 3, p. 25, l. 18-21.

²⁷⁹ *Id.* at 24, l. 17-22.

²⁸⁰ *Id.* at 26, l. 8-10.

²⁸¹ *Id.* at 25, l. 16-18.

such costs would be recovered, or the extent to which the proposed recovery of such costs would require an examination of, and potential changes to, the existing rate elements.²⁸²

CenturyTel's proposal would require Charter to agree to an open-ended provision that gives CenturyTel the discretion to impose charges upon Charter for performing functions not otherwise provided for in the Agreement.²⁸³ Such a result creates uncertainty as to Charter's contractual and financial obligations.²⁸⁴ This uncertainty could lead to disputes between the Parties over whether a charge is properly authorized under the terms of the Agreement.

CenturyTel may address new, upgraded, or enhanced OSS, and the recovery of any associated costs, through the contract amendment processes set forth in Section 4 (Amendments) and/or Section 12 (Changes in Law) of the agreement. Those sections provide a means by which CenturyTel could propose an amendment that specifically, and expressly, identifies the enhancements or upgrades, and the associated costs it seeks to recover or that it is required to implement as a result of a change of law.²⁸⁵ If the terms of CenturyTel's proposed amendment are reasonable, and consistent with applicable laws and regulations, the Parties should reach an agreement subject to the Commission's prior approval.²⁸⁶

²⁸² *Id.* at 25, l. 18-21.

²⁸³ *Id.* at 25, l. 21-23.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 26, l. 21-23.

²⁸⁶ *Id.* at 27, l. 7-10.

Decision

Charter's proposed language is reasonable. The Agreement should not include language that would allow CenturyTel to assess charges upon Charter for alleged costs that CenturyTel has not identified, or quantified. CenturyTel has failed to explain exactly what its costs would entail. The ambiguous nature of CenturyTel's proposed language would create uncertainty between the parties and could lead to future disputes that would likely be escalated to the Commission for review. CenturyTel could simply use the contract amendment and/or change of law process to seek to recover any future costs it believes it is entitled to recover. Accordingly, we accept Charter's proposed language.

The Arbitrator finds this issue in favor of Charter.

Article XII – Directory Services

31. How should each party's liability be limited with respect to information included, or not included, in directories?

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

In the event of publication of an End User Customer's listing information for a customer who requested *Charter* to provide it non-published status, CenturyTel should not be required to incur liability beyond situations involving its intentional or willful misconduct. *Charter* is solely responsible for providing its customer listings for publication. *Charter* is

contractually prohibited from providing to CenturyTel or a third party publisher the listings of any of its customers who do not wish to have published listings.²⁸⁷

Thus, if an End User Customer requests that Charter provide it non-published status listing, but its information is published, such publication would be due to Charter's error or omission. Charter should not be permitted to shift any such risk to CenturyTel. Furthermore, CenturyTel should not be required to incur the additional costs that would be caused by additional systems and/or processes to monitor Charter's own submissions and Charter's compliance with due dates imposed by the third party directory publisher.

Consequently, this is not a situation where CenturyTel is attempting to exclude liability for *its* ordinary negligence on an issue for which it bears responsibility under *Mo. Rev. Stat. § 392.350*. Under the terms of the Agreement, *Charter* is the entity who would bear responsibility for the inclusion of such a customer's information in the directory. *Charter* is the entity with the *sole* responsibility of providing or not providing such information to CenturyTel. CenturyTel's proposed language limiting liability to "gross negligence or intentional misconduct" is limited solely to a situation in which it publishes an End User Customer's or CLEC's listing information who did not want that information published.

This is not a situation where any and all liability is excluded for all directory listing situations. This exclusion applies only in a situation where Charter, not CenturyTel, bears the sole responsibility for the information provided to CenturyTel that is published. Thus, it applies in a situation where it is Charter's negligence that results in the error.

²⁸⁷ Agreement, at Art. XII, § 2.1.2. Specifically, the agreed upon language at this section states, "'Under no circumstances shall [Charter] provide End User Customer data as a part of the Primary Listing Information for those End User Customers who do not desire published listings.'"

Decision

The Arbitrator finds this issue in favor of CenturyTel.

32. How should the Agreement define each party's obligations with respect to fulfilling directory assistance obligations consistent with Section 251(b)(3) of the Act?

Findings of Fact

88. CenturyTel is meeting its obligation to provide Charter with non-discriminatory access to directory assistance.²⁸⁸

89. CenturyTel objects to Charter's proposal that it accept and process Charter's listings without compensation, and maintains that this would be contrary to the requirements of 47 C.F.R. § 51.217 that requires CenturyTel to provide directory assistance services to Charter on the same "rates, terms, and conditions" on which CenturyTel obtains such services.²⁸⁹

90. CenturyTel is not a directory assistance provider.²⁹⁰

Conclusions of Law and Discussion

The mutual obligations of Charter and CenturyTel with regard to directory assistance are provided in 47 U.S.C. § 251(b)(3) which, in pertinent part, states: "Each local exchange carrier has the following duties: . . . to permit all such providers to have nondiscriminatory

²⁸⁸ Ex. 21, p. 58, l. 18-28.

²⁸⁹ *Id.* at 59, l. 1-11.

²⁹⁰ *Id.* at 59, l. 13-17.

access to . . . directory assistance" The definition of "nondiscriminatory access" is provided in 47 C.F.R. § 51.217.

It is undisputed that neither Party provides directory assistance, but rather contracts with third party vendors for the performance of this service function. While Charter's witnesses have testified that past difficulties were experienced with a prior vendor of CenturyTel, these same witnesses acknowledge that such problems have been eliminated and that there are no issues with the directory listing information for Charter customers now being provided by CenturyTel's replacement directory assistance vendor.²⁹¹

The evidence reveals that Charter submits its directory assistance listings to Volt Delta, which maintains a national database, and that CenturyTel's directory assistance vendor dips the Volt Delta database for information. Further, CenturyTel's directory assistance vendor will use only the Volt Delta database in the future (planned to be effective as of January 2009).²⁹² As such, Charter is being provided nondiscriminatory access to directory assistance equivalent in type and quality to that which CenturyTel provides to itself. The Arbitrator finds that the foregoing arrangement satisfies the requirements of Section 251(b)(3) and the FCC regulations thereunder.

CenturyTel's proposed language for Article XII, § 8.0 reflects the facts in the record as well as satisfying the requirements of 47 U.S.C. § 251(b)(3). As such, the Arbitrator finds that CenturyTel's language for Article XII, §§ 8.0 set forth on pages 105-107 of the Joint Statement relating to Issue 32 should be and hereby is approved for the reasons identified in the above discussion.

²⁹¹ Ex. 9, p. 12, l. 18; p. 14, l. 17-19; Ex. 22, p. 43, l. 11-16.

²⁹² Ex. 21, p. 60, l. 14-20.

Decision

The Arbitrator finds this issue in favor of CenturyTel.

Article VII - 911

35. Should both parties' liability for errors associated with the provision of 911 services be limited by contract, in a manner that is consistent with applicable law?²⁹³

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

In Issue 15, the Arbitrator noted that this Commission has previously ruled that "as a matter of public policy," parties to interconnection agreements should not be permitted to escape liability for "intentional, willful or gross negligent conduct."²⁹⁴ The Arbitrator will follow that decision.

This question arises in the context of the 911 sections of the draft Agreement. The provision of 911 services in Missouri is generally a matter of great significance, and one which must be carefully reviewed to ensure that service providers obligated to provide these important services are held accountable for their actions.

²⁹³ CenturyTel's phrasing of the issue is: "Should CenturyTel's liability for 911 system errors be limited to the reasonable costs of replacement services?"

²⁹⁴ *SBC Arbitration-Commission Decision*, at 56.

The differences between their respective proposals are evident. First, Charter proposes that the limitation of liability language apply reciprocally, to both Parties' benefit.²⁹⁵ CenturyTel, in contrast, proposes language that would only benefit CenturyTel, and which would not benefit Charter. Regardless of the scope of liability adopted herein, there is no reason that these provisions should not apply to the benefit of both Parties. Both Parties provide 911 services to their respective end user customers. The Arbitrator fails to see why only one Party should benefit from the protections of this language.

The Arbitrator recognizes that CenturyTel, as an incumbent provider, has greater obligations with respect to certain 911 network facilities. But Charter is also responsible for establishing, and maintaining lines and trunks to connect to the incumbent 911 network, and therefore bears much of the same risk as CenturyTel.

With respect to the question of what liability standard should apply, as noted above, it is against public policy for a party to escape, or limit, liability when that Party's fault rises to the level of gross negligence, or intentional or willful misconduct. This principle is especially true in light of the significant public policy concerns surrounding the provision of 911 services. Any Party that proposes to limit its liability for harm caused by gross negligence or intentional misconduct bears the burden of demonstrating that such liability limitations are appropriate.

Nor does CenturyTel explain why this Commission should depart from the concept it has used in prior proceedings. For example, in the 2005 SBC arbitration proceeding, Case No. TO-2005-0336, the Commission approved SBC's proposed contract language, which

²⁹⁵ DPL at 113-115 (Charter proposed language Art. VII, 9.3 and 9.6).

specifically carved out liability arising from gross negligence, recklessness or intentional misconduct from the 911 liability limitations provisions of the final agreement.²⁹⁶

More significantly, however, the courts of Missouri have construed our statutes in a manner that is not consistent with CenturyTel's attempts to limit its liability. That statute provides that any telecommunications company that causes some act or omission which results in loss or damages "shall be liable to the person or corporation affected thereby for all loss, damage or injury caused thereby or resulting therefrom."²⁹⁷ In construing this language, and in consideration of the common law rights to recover punitive damages, the Missouri Court of Appeals concluded that telephone companies can not escape liability (and damages) when the "acts complained of were done wrongfully, intentionally, or without just cause or excuse."²⁹⁸

Further, the *Overman* court noted that cases in Missouri recognize the propriety of imposing punitive damages against a telephone company "in a proper case." To this point the *Overman* court cited, with approval, the decision in *Warner v. Southwestern Bell Telephone Company*,²⁹⁹ in which the Missouri Supreme Court stated that a tariff limiting the amount of damages for errors and omission (in directories) are generally valid and enforceable, but they "do not exempt a defendant when its conduct has been wanton and willful, . . ."³⁰⁰

²⁹⁶ Final Arbitrator's Report, Appendix IXA Detailed Language Decision Matrix (Issue number CC-E911 – 9).

²⁹⁷ § 392.350 RSMo.

²⁹⁸ *Overman v. Southwestern Bell Tel. Co.*, 675 S.W.2d 419, 424 (Mo.App. 1984).

²⁹⁹ 428 S.W.2d 596, 603 (Mo. 1968).

³⁰⁰ *Overman*, 675 S.W. 2d at 424 (citing *Warner v. Southwestern Bell Telephone Company*, 428 S.W.2d 596, 603 (Mo. 1968)).

Indeed, the *Overman* court concluded that in none of the Missouri cases on the books did the courts ever rule “that a telephone company is not liable for intentional torts, and those for resultant punitive damages.”³⁰¹ As a result, the court concluded, that “[t]he only conclusion is that the Missouri General Assembly has chosen not to act in specifying or limiting the types of damages recoverable for violations of § 392.200, or of the common law.”³⁰² Thus, in accordance with these decisions, the Arbitrator will not allow either party to limit its liability when it has acted in an intentional, willful or grossly negligent manner.

Finally, also rejected are CenturyTel’s attempts to limit the total amount of damages that it may be liable for if it engages in grossly negligent behavior, or intentional/willful misconduct. Consistent with its position on issue 15(c), above, Charter argues that the Parties should not limit their damages in a way that would preclude one Party from obtaining meaningful relief from the other, when the party at fault is grossly negligent or engages in intentional misconduct.

This issue has already been decided. As noted in the discussion of issue 15(c), in the 2005 arbitration proceeding between SBC and various competitive LECs, the Commission affirmed the Arbitrator’s ruling that “it is contrary to public policy to cap liability

³⁰¹ *Id.* at 424.

³⁰² *Id.*

for intentional, willful, or grossly negligent action.”³⁰³ Because the Commission has already decided this very question, the Arbitrator will reject CenturyTel’s proposal here.³⁰⁴

Decision

The Arbitrator finds this issue in favor of Charter.

36. Should each party be required to indemnify and hold harmless the other party except where the indemnified party has engaged in acts that constitute negligence, gross negligence, intentional or willful misconduct in connection with E911 service?³⁰⁵

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

In the discussion of Issue 35, the Arbitrator concluded that the 911 liability provisions should benefit both Parties reciprocally. Both Parties provide 911 services to their

³⁰³ SBC Arbitration - Commission Order at 56 (affirming Arbitrator’s Final Report, Sec. 1(a) at p. 71).

³⁰⁴ The Arbitrator also agrees with Charter that CenturyTel’s proposal presents another problem. Because this Agreement contemplates primarily the exchange of traffic, without significant liabilities for leasing, resale or other services, the amount of monthly charges that the Parties are subject to is relatively small. For that reason, CenturyTel’s proposal to limit direct damages to no more than an amount equal to such monthly charges could effectively preclude recovery of the amount of direct damages that arise from a significant harm or error that occurred to one Party’s network, employees, or other assets. Therefore, it would also be improper to limit damages in this way if such limitations preclude the injured Party from recovering its actual damages.

³⁰⁵ CenturyTel’s phrasing of the issue is: “Should CenturyTel be protected from 3rd party liability related to Charter’s errors in providing subscriber information to CenturyTel?”

respective end user customers, and therefore both Parties have potential liability concerns arising from their provision of 911 service to their respective end users.

CenturyTel claims that this provision should only apply for CenturyTel's benefit, because only CenturyTel "is responsible for managing the Database Management System and relaying subscriber information to the counties."³⁰⁶ That may be true. However, it does not address the basic premise of this indemnity language, which applies to "any damages, claims, [or] causes of action..."

The specific contract language at issue here is quite broad, in that it would impose indemnity obligations for "any damages, claims, causes of actions, or other injuries whether in contract, tort, or otherwise which may be assessed by any person, business, governmental agency, or other entity . . . as a result of any act or omission [of the other Party] . . ."³⁰⁷ Thus, it does not apply only to the specific claims that may arise as a result of CenturyTel's unique obligations in administering the 911 system.

Instead, it applies to potentially all claims arising from any 911 service. As previously noted, Charter also provides 911 service to its end users as required by state law, and therefore may be faced with "potential damages, claims, causes of actions, or other injuries whether in contract, tort, or otherwise." Charter therefore may also face certain 911 liability, and should therefore be afforded the same indemnity protections which CenturyTel seeks for itself.

Given these facts, the Arbitrator declines to adopt contract language that would allow only one Party to benefit from the protections of this language. This conclusion stands, even though CenturyTel, as an incumbent provider, has greater obligations with

³⁰⁶ DPL at 115 (CenturyTel Position Statement).

³⁰⁷ *Id.*

respect to certain 911 network facilities. Nevertheless, as discussed above, Charter is also responsible for establishing, and maintaining lines and trunks to connect to the incumbent 911 network, and therefore bears much of the same risk as CenturyTel. Accordingly, Charter's proposal to make this language reciprocal, to apply to both Parties' benefit, will be adopted.

Decision

The Arbitrator finds this issue in favor of Charter.

37. Should the Agreement limit both Parties' liability related to the release of information, including nonpublished and nonlisted information in response to a 911 call?

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

In this situation, CenturyTel's proposed language provides that if information is released to emergency response agencies responding to calls placed to an E911 service, CenturyTel will not be liable for the good faith release of information not in the public record. In contrast, Charter proposes the neither party should be liable in the event of the other Party's negligence. The Arbitrator finds CenturyTel's language to be reasonable and adopts the same.